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NO.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM 1987

RICHARD G. ELMENDORF, Petitioner

v.

SHALER AREA SCHOOL DISTRICT, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO
THE COMMONWEALTH COURT OF PENNSYLVANIA

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"To compel a man to furnish contributions of money for the propagation of [religious] opinions which he disbelieves is sinful and tyrannical"

Thomas Jefferson
1786

QUESTIONS PRESENTED

1. May statutorily-provided and constitutionally-guaranteed due process be denied to a defendant in a tax claim filed by the state against his property?

2. Does the due process clause of the 14th Amendment to the United States Constitution protect a taxpayer from being deprived of his property by means of a tax claim without having the opportunity to contest the claim?

3. May the state claim and collect taxes under the authority of a state statute without permitting the property owner to contest the validity of the claim by means expressly provided in the same statute?

4. Is denial of the use of the only statutory means available to contest tax claims against a defendant's property

consistent with the due process clause of the 14th Amendment of the U.S. Constitution?

5. May a clearly erroneous tax claim be enforced for collection by the judgment of a state court without the defendant in the claim being given an opportunity to prove that the claim is in error?

6. May a state court refuse to recognize and decide upon a federal constitutional question properly presented to it and crucial to its decision?

7. May a state court justifiably base its decision against a defendant on a substantial misstatement of the nature and specific allegations of the defendant's case?

8. May judicial authority supercede constitutionally-valid statutory authority where there is a conflict between them?

9. Can an illegal tax be collected by a taxing body by filing a tax claim against a taxpayer who declines to pay the illegal tax initially?

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RICHARD G. ELMENDORF, Petitioner

v.

SHALER AREA SCHOOL DISTRICT, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE COMMONWEALTH COURT OF PENNSYLVANIA

The petitioner Richard G Elmendorf respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania entered in the above-entitled proceeding on 28 July 1987.

OPINIONS BELOW

The opinion of Common Pleas Court of Allegheny County Pennsylvania issued 12 September 1986 has not been reported. It is reprinted in the appendix hereto on page A6.

The opinion of Commonwealth Court of Pennsylvania issued 28 July 1987 also has not been reported. It is reprinted in the appendix hereto on page A1.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC 1257(3) where a right claimed under the United States Constitution has been denied by the final judgment of the highest State Court in which a decision could be had.

The judgment sought to be reviewed was handed down by the Commonwealth Court of Pennsylvania on 28 July 1987. An application for reargument to that court was dismissed on 19 August 1987 and a petition for allowance of appeal to the Pennsylvania Supreme Court was denied on 21 January 1988. Hence this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment 14 Section 1 Due Process Clause.

Pennsylvania Statute 1923 PL 207 Sections 9,10,15,16,17,19,20 (53 PS 7101 et seq).

Applicable excerpts of the above statutory and constitutional provisions are reproduced in the appendix hereto pages A18-A21.

STATEMENT OF THE CASE

As it comes to the Supreme Court, this is not a "tax case", it is a DUE PROCESS CASE. Although it started out with the parties arguing over the validity of certain tax claims filed by respondent against petitioner's property, it quickly degenerated into a struggle over federal constitutional rights claimed by petitioner and denied by the state courts. Thus while the case must necessarily be described in terms of state law and state tax matters, it should be clearly understood that the issue here at stake is due process and not taxes.

The case has to do with the question of whether the 14th Amendment to the U.S. Constitution entitles a property owner to defend his property against tax claims made by the state, or whether the state may unilaterally claim and collect taxes without providing a meaningful opportunity for the

property owner to challenge the validity of such claims.

Motivated by a long history of frustrated efforts to resolve serious differences with respondent over the teaching of evolution in public school classrooms, which he believes to be a religious practice, and concurring with Thomas Jefferson that:

> "To compel a man to furnish contributions of money for the propagation of (religious) opinions which he dis disbelieves is sinful and tyrannical" [1]

petitioner some years ago determined to directly challenge the legality of taxes used for such teaching. This he did by withholding a portion of the school taxes levied on his property for tax years 1981 and 1982, which he termed the "evolution tax".

In due course, respondent filed tax claims as liens on petitioner's property under the Pennsylvania Municipal and Tax

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[1] Virginia Statute of Religious Liberty Section I.

Claim Act 1923 PL 207 in Common Pleas Court of Allegheny County Pennsylvania, designating petitioner as "defendant" in the claims filed. Petitioner then proceeded under the same statute to challenge the claim by filing and serving a notice to issue a scire facias. Respondent issued the scire facias and petitioner then filed an affidavit of defen required. Respondent could then have petitioned for a rule for judgment for want of a sufficient affidavit of defense under the statute, which if granted would have given respondent judgment on the claim and if denied would have taken the matter to trial.

Respondent did not follow this statutory procedure, however, but instead filed preliminary objections to the affidavit of defense, alleging among other things that the court had no jurisdiction to consider an affidavit of defense to the tax claims, and therefore that the affidavit of defense should be

dismissed and judgment entered. Petitioner filed an answer to the preliminary objections and a hearing[2] was held, after which the court granted the above objection[3].

Petitioner then appealed to Commonwealth Court of Pennsylvania, which affirmed the lower court decision on the basis that preliminary objections were a proper means of adjudicating the case and that the scire facias procedure in 1923 PL 207 could not be used by a taxpayer who had not pursued his "statutory remedies".

An application for reargument was dismissed by Commonwealth Court and petitioner

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[2] At no time during the hearing was petitioner allowed to present or argue his defense. The hearing was limited strictly to consideration of the preliminary objections. The court did not address the merits of the defense in its opinion.

[3] Of the other preliminary objections, two were declared moot by the court and one is clearly irrelevant to the case. Respondent never did challenge the "sufficiency" of the defense.

filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was denied without opinion on 21 January 1988. Petitioner now turns to this Court seeking a writ of certiorari on the basis of the denial of his statutory and constitutional due process rights.

Respondent's basic position in this case is that it has authority to levy and collect taxes without being challenged by petitioner in the manner chosen.

Petitioner's basic position is that he has a statutory and constitutional right to defend his property against tax claims, however originated and whether valid or not, and to have the merits of his defense determined on the basis of a fair trial before a fair tribunal.

RAISING THE FEDERAL QUESTION

The federal constitutional issue of due process was raised and pursued in all three state courts as detailed in the appendix hereto pages A11-A17.

REASONS FOR GRANTING THE WRIT

I

THE STATE COURT DECISIONS DENIED THE CONSTITUTIONAL RIGHT OF DUE PROCESS TO PETITIONER

The most important reason for granting certiorari in this case is that a federal constitutional right has been clearly claimed by petitioner and clearly denied by the state courts. This right is the right of due process which is set forth in the 14th Amendment to the United States Constitution in the following words:

> "...nor shall any state deprive any person of life, liberty or property without due process of law..."

The meaning of the cryptic phrase "due process of law" has been determined by this Court to cover at least the following principles[4]:

- It is a primary and indispensable foundation of individual freedom.

- It protects and enforces private rights.
- It constitutes a restriction of state power.
- It prevents arbitrary and capricious exercise of that power.
- It applies to legislative, executive and judicial branches of government.
- It protects all classes of "persons" equally.
- It may be provided in whatever form and by whatever procedures the state chooses as long as they are reasonable and effective.
- It is the composite result of both legislative and judicial interpretation.
- It requires observance of all the sequential steps for collection of taxes prescribed by a state statute.
- It entitles a person to an impartial

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[4] Individual citations have been omitted in this petition for brevity.

and disinterested tribunal in both civil and criminal cases.

- It requires notice and an opportunity to be heard.
- The notice must be actual and not merely constructive.
- The notice must permit an adequate opportunity to prepare for the hearing.
- The hearing must be a real one, and not a sham or a pretense.
- The hearing must be held at a meaningful time and in a meaningful manner.
- The hearing must be tailored to the capacities and circumstances of those who are to be heard.
- The right to present evidence is essential to a fair hearing.
- The hearing must provide a real test to establish the validity of the underlying claim against the alleged debtor.
- Due process requires a fair trial in a fair tribunal.

- It requires an opportunity to prove the defense.
- It provides a means to confront and cross-examine adverse witnesses.
- It is essential to a valid judgment.
- It renders judgment only after trial.

A comparison of these principles with the proceedings conducted by the state courts in this case leads to the inescapeable conclusion that due process was clearly denied to petitioner. Petitioner is entitled to a meaningful opportunity to present and argue his defense against the tax claims upon his property before an unbiased tribunal. The state legislature has provided such an opportunity exclusively through the provisions of the 1923 PL 207 Tax Claim Law. At every turn from the very beginning, however, the state courts have made it plain that they will not permit any such defense to be presented, even if it means failing to provide notice, misstating petitioner's case,

permitting unusual and unfair procedures, ignoring plain errors in the claims, neglecting to accomodate petitioner's physical disability, refusing to enforce state tax law, evidencing a special bias against petitioner's class, ignoring the substance of the defense, deciding the case before the defense is heard, demanding that petitioner use non-existent "other ways" to oppose the taxes, and otherwise arbitrarily and capriciously denying the constitutional property rights of petitioner.

The decisions of the state courts are therefore incompatible with settled federal constitutional doctrine and conflict with applicable decisions of this Court. The federal question is an important general principle of law. The necessary effect of the judgments of the state courts is to deny the principle of due process in all similar cases. Judgment obtained by denying a federal constitutional right is reversible

error. Appeal to this Court is the only means for petitioner to seek redress of this wrong. Hence this Court should take jurisdiction to correct this misapplication of the state's tax enforcement power.

II

THE STATE COURTS MISSTATED AND DISTORTED PETITIONER'S CASE

In order to understand the other reasons for granting the writ, it is necessary to set the record straight on what petitioner's case actually consists of. Taking the lower court opinions at their face value, they might form a plausible basis for justifying the decisions reached below. Since these opinions are the only part of the record fully incorporated into this petition and readily available for reference by the Court, it might seem that the whole matter deserves no further consideration and should be disposed of by a prompt denial of certiorari.

But these lower court opinions cannot

be accepted at face value. They do not represent petitioner's case accurately or fairly. They have distorted and misstated his position so as to turn the case into some other entirely different case, which is not petitioner's case. Both of the lower court opinions include statements which are simply untrue with respect to what has happened in the proceedings and what petitioner has asserted in his pleadings. They show a considerable misunderstanding of what the case is all about, and must be corrected before anyone can begin to appreciate why the results below are so unjust.

The Common Pleas Court Opinion

In its opinion,Common Pleas Court stated several things which are factually in error:

(a) The court states that "The action began...when the defendant filed a notice to issue a scire facias upon the plaintiff." CORRECTION: The legal action began when the plaintiff originally filed tax claims in

Common Pleas Court. That is when the jurisdiction of the court was first invoked and the process of collection was initiated. Respondent is the plaintiff and started the legal action, not petitioner, who is the defendant.

(b) The court states that petitioner had withheld taxes "in protest to the teaching...of the theory of evolution" and "as a protest to educational philosophies of the school district". CORRECTION: The taxes were withheld to challenge the validity of the taxes used to pay for such teaching, not just as a protest to the teaching itself, as is clearly asserted throughout the pleadings. For example, in the affidavit of defense in paragraph 4, petitioner said:

> "The defendant paid part of these taxes and withheld part in order to challenge the legality of that portion of the school tax which was used for such teaching..."

Thus the means used by petitioner to get at the teaching was to attack the validity of

the taxes which support the teaching. There is nothing wrong with this approach. It is not accurate for the court to label it a mere philosophical protest against teaching policies. It has tax teeth.

(c) The court states that "...a taxpayer does not have the right to withhold properly assessed taxes...". CORRECTION: The whole point of petitioner's defense was that the contested taxes were not properly assessed, for various reasons stated in his pleadings. For example, in paragraph 9 of the answer to preliminary objections he states:

> "Defendant dpecifically denies that the taxes in question were 'properly assessed' as claimed by the plaintiff. He believes that they are unlawful taxes and that he has every right to challenge them in this way through the provisions of the Tax Claim Act."

There is no excuse for the court to ignore all of petitioner's assertions on this point and accept respondent's equivocal views of "assessment". This issue is important but was never even recognized by the court.

(d) The court refused to consider the merits of the affidavit of defense in its opinion, and totally ignored the federal issue of due process which had been presented to it. These are serious omissions of adjudication.

The Commonwealth Court Opinion

Commonwealth Court likewise misstated and misrepresented petitioner's case in its opinion as follows:

(a) The court repeated the errors of Common Pleas Court that the action commenced with a notice by petitioner rather than with the filing of tax claims by respondent, and that the taxes were withheld only as a protest to the teaching of evolution rather than as a challenge to the legality of the taxes.

(b) The court stated that a "hearing" was held, but failed to mention that the hearing was limited strictly to the preliminary objections and never addressed either the defense or the request for a jury trial.

The statement is thus seriously misleading on the crucial matter of due process and the right of petitioner to present his defense in a fair trial before a fair tribunal.

(c) The court stated in effect that petitioner did not "pursue his statutory remedies" before attempting to use the scire facias procedure in 1923 PL 207, and ignored the many attempts by petitioner in his pleadings to point out that there are no such "statutory remedies"available[5]. For example, in paragraph 3 of the reply to brief for appellee petitioner states:

> "The school's argument that the Pennsylvania Supreme Court has 'consistently held' that a taxpayer may not attempt to raise the merits of a tax claim when he has not pursued his statutory remedies is false, because as the taxpayer has already pointed out several times, no such statutory remedies to contest school tax levies exists."

(d) The court states that petitioner did not challenge the school district's

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[5] This is unarguable. The court is plainly in error to imply otherwise.

right to collect the tax". That is absolutely false. Petitioner challenged repondent's claim to such a right in any number of ways in his pleadings. Petitioner's frustration with such misrepresentations is aptly summed up in the answer to brief for appellant in paragraph 7 as follows:

> "The school's insistence that it still has a 'right' to collect such a tax illustrates the arrogant attitude of many public school educators toward the taxpayers who pay their bills. The school is saying 'You have to pay our tax whether it is legal or not'. This taxpayer strongly disagrees. He believes that the school has no authority to make any such demand, much less to enforce it. By what statutory authority would the school presume to take such extraordinary action?"

(e) The court also completely ignored the federal issue of due process which had been clearly presented to it, and failed to recognize or evaluate the merits of the affidavit of defense in any way.

From these few examples, it should be clear that the lower courts seriously

misstated and misinterpreted petitioner's case, treated it as if it were just another philosophical protest against teaching policies, and refused to recognize that it comprises a clear and direct challenge to the legality and collection of the taxes supporting such teaching. In so doing, the lower courts have decided some other case, not this one. The extent to which these courts are apparently willing to distort petitioner's side of the record and uncritically adopt respondent's views of the case without bothering to see if they are supported or true is disheartening. This is not just "harmless error", it is a form of false witness. How can such courts claim to be fair tribunals whose decisions will be willingly accepted by citizens who come before them?

The Pennsylvania Supreme Court evidently did not care about such problems since it declined to review the case. The question is now whether fundamental accuracy and

fairness in judicial opinions is of concern to the Supreme Court.

III

THE STATE COURT DECISIONS WERE NOT BASED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

The Supreme Court and all other federal courts follow the principle of 28 USC 1652 which states:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

This means that if a state law which is constitutionally valid covers litigation proceedings before it, the Supreme Court will regard the state law as the controlling rule of decision in the case. In the present litigation, that law is the Pennsylvania Municipal and Tax Claim Act 1923 PL 207[6],

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[6] Having been in effect for many years, 1923 PL 207 is presumably constitutionally valid.

the relevant provisions of which are listed in the appendix hereto pages A19-A21. If the state court decisions are compatible with that law and reasonably justified in the light of its provisions, those decisions may withstand the scrutiny of this Court on appeal, even though they may not be wise or even correct decisions. If they do not satisfy the requirements of that law, however, and if a federal issue is involved and has been properly raised before those courts, this Court may take jurisdiction to correct such erroneous decisions.

The principle is that no court has the authority to arbitrarily thwart the will of its own legislature, unless the legislature has acted contrary to the constitution or outside of its legitimate authority. Also it is not for any court to "say what the law is", if the creator of the law - the legislature - has made plain in the legislation itself what has been enacted.

Neither is it the prerogative of a court to apply or refuse to apply the law to situations which the statute itself does not or does specifically apply it.

In the light of these principles, the opinions of the lower state courts can be examined to see if they are supportable on adequate state grounds independently of the federal constitutional question which has been raised. Petitioner contends that the decisions of the lower state courts cannot possibly be justified under state law, for the following reasons:

(a) Applicability of 1923 PL 207

This case was initiated in Common Pleas Court when respondent filed tax claims under Section 9 of the 1923 PL 207 statute[7]. Those claims listed petitioner as "defendant" under Section 10 of that statute. Petitioner responded by filing a notice to issue a

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[7] As it was authorized to do by Section 421.03 et seq of the Penna Public School Code.

scire facias under Section 16 of the statute, and respondent filed a scire facias under that same section. Petitioner then filed an affidavit of defense[8] under Section 17 of the statute, anticipating respondent's motion for judgment for want of a sufficient affidavit of defense, or his reply to the defense and then trial under other sections of the statute[9].

At this point, however, respondent abandoned the statutory procedure and filed preliminary objections which challenged petitioner's right to use the 1923 PL 207

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[8] It would not be a valid argument to claim that due process was satisfied merely by the issuance of a scire facias and filing of an affidavit of defense. The scire facias is "notice" to defend, but it does not provide the format for trying the defense. Being permitted to file the affidavit of defense does not provide that format either. The affidavit of defense is an affidavit, not the defense itself. It is merely a declaration by a defendant that he does in fact have a defense to offer. It may list but does not attempt to develop or argue those defenses in any sense comprehensively, nor is it required by the statute to do more than simply deny the particular averments of the

statute to defend his property against the claims. Common Pleas Court agreed with this approach, dismissed the affidavit of defense, and granted "judgment"[10] on the claims. On appeal, Commonwealth Court affirmed this decision.

Both courts are clearly wrong to deny

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scire facias which are being contested (see answer to preliminary objections paragraph 13). Therefore it cannot be said that a defense has been adjudicated merely because a scire facias was issued and an affidavit of defense filed. It is assumed that this point will not be contested by respondent since in a parallel case involving the same parties and similar issues now on petition for allowance of appeal to the Pennsylvania Supreme Court, respondent refused to issue the scire facias, petitioner never filed an affidavit of defense, and both lower courts still denied the use of the scire facias procedure to petitioner for identical reasons to those given in this case.

[9] Although the sequence of events leading to trial is somewhat ambiguous in 1923 PL 207, a parallel tax statute which applies in every county in Pennsylvania except Philadelphia and Allegheny makes it quite clear that the intention of the legislature was to provide a prompt trial without further pleadings once the defense had passed the "sufficiency"test.

defensive use of the 1923 PL 207 statute to petitioner, however. Respondent filed its claims under the provisions of this statute. Respondent issued the scire facias under the provisions of this statute. Respondent intends to collect the claims under the provisions of this statute. It is ridiculous to claim that petitioner may not use the provisions of the same statute to defend against those claims. What is sauce for the goose is sauce for the gander. Respondent should never have filed the claims under the statute in the first place if it did not wish to submit itself to all of its provisions. In Commonwealth v. Atlantic & Gulf

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[10] Whether judgment was actually entered by the court as requested in the preliminary objections is uncertain. The Common Pleas opinion states only that the preliminary objections were "granted", and the Commonwealth Court opinion states only that the preliminary objections were "sustained" and the validity of the liens "upheld". An entry was made in the Judgment Index when the scire facias was issued, but that was long before the hearing was even held.

Coast Stevedores, the Pennsylvania Supreme Court dealt with a similar scire facias situation and declared that:

> "The jurisdiction of the lower court was here properly invoked by the Commonwealth's own actions. Having done so, it cannot deny this jurisdiction now but must proceed by the means suggested to achieve its ends."

The lower courts have no authority to pick and choose which provisions of such a statute may be used and which may not. Once the 1923 PL 207 statute is introduced, both respondent and petitioner stand or fall by the whole of it.

(b) Availability of "Other Ways"

Both lower courts based their decisions on an uncritical acceptance of respondent's suggestions that "other ways" should have been used by petitioner to oppose its practices instead of a tax case under 1923 PL 207. Common Pleas Court granted Count I of the preliminary objections which proposed that an appeal of the property value assessment

was the proper procedure for petitioner to follow, but this is so obviously irrelevant to the case that Commonwealth Court did not even mention it in its opinion. Count II, also granted by Common Pleas Court, proposed that petitioner should have filed an action against illegal use of school finds under the Public School Code instead of challenging the collection of such funds under 1923 PL 207. That is also irrelevant, because what petitioner actually did challenge was both the collection and the use of the funds, and therefore the case belongs properly under 1923 PL 207. It might be added here that a taxpayer has no opportunity, statutory or otherwise, to challenge the validity of school taxes when they are first levied and assessed, even though such an opportunity is available for many other kinds of taxes and assessments.

Commonwealth Court stressed a third alternate put forth by respondent by stating

that "The courts of this Commonwealth have consistently ruled that a taxpayer may not attempt to raise the merits of a tax claim in scire facias proceedings when he has not pursued his statutory remedies". But as has already been covered in the previous section, there are no such "statutory remedies" available to contest school tax claims such as those at issue in this case, so there is simply no valid basis here to deny use of the scire facias procedure in 1923 PL 207. It should be clear that none of these "other ways" proposed by respondent and the courts could be validly applied to the conditions of this case, much less insisted on as mandatory alternate procedure. In any event, this way is what was used, and this way is what must be shown to be wrong if the decisions of the state courts are to be upheld on an adequate state law basis. That most certainly has not been done by either respondent or the courts.

(c) Criteria for Summary Judgment

Common Pleas Court granted what amounted to a summary judgment on the tax claims but without concurrently accepting everything alleged in the affidavit of defense as true, as state case law requires[11]. If the court had done so, it would have had to accept among other things that the "evolution tax" is unlawful and unenforceable. As a result, there would be no lawful tax on which to base a claim, and nothing to reduce to judgment.

(d) Insufficiency

The exclusive pre-trial method of obtaining a judgment on tax claims provided in the 1923 PL 207 tax statute is the provision in Section 19 for a claimant to petition for a "rule for judgment for want of a sufficient

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[11] "It is a settled rule that whatever is contained in an affidavit of defense must be treated as verity upon a motion for judgment" Philadelphia v. Baker.

affidavit of defense". Respondent neither challenged the sufficiency of the affidavit of defense nor petitioned for such a rule, so the state courts had no statutory basis on which to enter judgment on the claims. Common Pleas Court did not cite this provision as a basis for its decision, but Commonwealth Court stated that the Pennsylvania Supreme Court "has allowed the use of preliminary objections to challenge the sufficiency of an affidavit of defense", implying that such a challenge existed in the case. Since it clearly did not, there is no state law basis for either allowing the preliminary objections or entering judgment on the claims.

(e) Cases Cited

The particular cases cited by the state courts to support their decisions further illustrate the lack of adequate state law grounds. Common Pleas Court cited Regan v.

Stoddard, which did not even involve tax claims or an affidavit of defense to such claims, and is therefore irrelevant to the case, reflecting again the court's misunderstanding of what petitioner has challenged. Commonwealth Court cited two cases to justify allowing preliminary objections to block use of the scire facias procedure. In Commonwealth v. Lentz, the controlling case, preliminary objections were not even used, so it is obviously inapplicable. In Commonwealth v. Atlantic & Gulf Coast Stevedores, the preliminary objections were dismissed as untimely filed and therefore moot, and in addition the Pennsylvania Supreme Court stated that they should have been treated as a motion for judgment for want of a sufficient affidavit of defense. Since this is the same procedure which petitioner claims respondent should have used but did not, there is no legitimate support for the court's approval of preliminary objections from

Atlantic.

In contrast to the lack of support for the decisions in these cases, they could be cited to show that the real purpose of the scire facias procedure is to provide due process in tax collection proceedings. In Lentz the local court stated that:

> "A writ of scire facias is the time honored method in this Commonwealth for testing the validity of a lien. The writ of scire facias is 'due process of law' within the meaning of the Fifth Amendment of the United States Constitution and 'due course of law' within the meaning of Article I Section 11 of the Constitution of the State of Pennsylvania."

In the same case, the Pennsylvania Supreme Court quoted from Hodge v. Muscatine County that:

> "If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceeding for review take place before a board having a quasi judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process is not denied."

These are the principles which should have

been followed in adjudicating the present conflict instead of derailing due process with preliminary objections and a summary judgment. If the lower courts had taken the trouble to understand and accurately state petitioner's position, perhaps they might have been willing to do this instead of deciding a case which does not even exist.

(f) State Constitution

The Pennsylvania Constitution itself prohibits the action taken by the lower courts. In Article I Section 1 it protects the right of "acquiring, possessing and protecting property", and in Article I Section 9 it prohibits deprivation of "life, liberty or property, unless by the judgment of his peers or the law of the land". Petitioner has been prevented from "protecting" his property by denying him access to both the "judgment of his peers" (a jury trial), and the "law of the land" (the 1923 PL 207

statute).

In summary, petitioner's offer to make a defense to the tax claims under the 1923 PL 207 law was refused by the courts below not on any valid basis of the inapplicability of 1923 PL 207, the availability of "other ways" to litigate, insufficiency of the defense, proper application of state case law, or state constitutional criteria, but solely because the courts were determined to suppress the challenge to the claims by arbitrarily declaring use of the scire facias procedure to be illegitimate. The courts apparently never considered the fact that when they did so, they eliminated the only statutory means available for a defendant to contest school tax claims once they exist, and precluded any possibility of having a defense adjudicated at all - a plain denial of due process. The state courts thereby painted themselves into a corner and must face the federal constitutional issue of due process.

IV

THE STATE COURT DECISIONS GRANTED JUDGMENT ON A PLAINLY ERRONEOUS TAX CLAIM

A perfect example of how wrong the state courts are to suppress petitioner's defense to these tax claims is the wrong amount of the lien filed on petitioner's property for the 1982 tax year. Petitioner withheld about one-fourth of the school tax in that year and paid three-fourths of the tax, but respondent filed the claim for the entire gross tax - about four times the unpaid amount. This was brought to the attention of the courts in the affidavit of defense and subsequent pleadings. Given a fair opportunity to do so, petitioner could easily prove that the tax claim is in error, both by his own cancelled check and tax receipt and by the records and testimony of the tax collector himself, but the decisions of all three state courts have denied petitioner this simple opportunity. The Pennsylvania courts

are so obviously wrong about this that one would think they would be embarrassed.

Whether the original error was due to carelessness, incompetence, capriciousness or even vindictiveness on the part of respondent is not known, but there it is, standing out like a sore thumb, exposing the actions of respondent and the courts for what they really are - a policy of arbitrary rejection of tax dissent of any kind, whether having merit or not, by any means, whether lawful and constitutional or not. Even if respondent should eventually acknowledge its error and correct the claim (which it has refused to do for three years), the example remains as proof of the crucial need for due process, giving all defendants at all times the right to challenge the validity of any claim made by the state upon their property. If this right is taken away, it places all Pennsylvania citizens, not just petitioner, at the mercy of an unrestrained and

uncorrectable state.

V

THE STATE COURTS PERMITTED IRREGULAR AND UNFAIR PROCEDURES TO FRUSTRATE THE DEFENSE

Trying to cope with the procedures followed by respondent and the courts in this case has been a very interesting and instructive experience for petitioner, but has not done much to enhance his confidence in our system of justice in Pennsylvania, which seems to hinder due process at every turn. The following examples will illustrate the problem:

(a) The tax claims at issue in this [illegible] were originally filed by respondent without any notice to petitioner of intention to do so or notice of having done so. It was left entirely up to the initiative of petitioner to discover on his own what had already been accomplished in a court proceeding without his knowledge and without an opportunity to

contest the action.

(b) Having discovered the claims upon his property, petitioner found that the name of petitioner's son, who is neither an owner nor a resident and has nothing to do with this matter, had been added to the lien docket some time after the claims were filed and without notifying either the son or petitioner. This is just a bureaucratic cheap shot, having no lawful basis whatsoever.

(c) Petitioner was given no information in the claims or by the claimant or the court whereby he would know how to challenge the validity of the claims should it be necessary to do so. When he researched the matter himself, he learned that there is only one way to contest such tax claims, and that is by the procedures spelled out in the 1923 PL 207 statute.

(d) When he attempted to initiate such a procedure by filing the required notice to issue a scire facias, the clerk of the court

accepted it reluctantly and only after assessing a special filing fee which is not required in municipal claims filed under the same statute.

(e) When the scire facias was issued, the court simultaneously entered it in the Judgment Index, indicating that the tax claim had already been accepted as valid and conclusive even before an affidavit of defense had been filed.

(f) As soon as the affidavit of defense was on file, respondent introduced preliminary objections, even though they are not mentioned in the statute and even though the statute requires respondent either to petition for a rule for judgment for want of a sufficient affidavit of defense or to reply to the statements in the affidavit of defense.

(g) A hearing on the preliminary objections was initially scheduled without notifying petitioner, and then rescheduled allowing only a few days for petitioner, who is self-employed and representing himself, to research,

write and file an answer and supporting brief to the preliminary objections. On petition, a continuation was granted, with the clerk of the court muttering that petitioner "would never have gotten away with that if it had been a tough judge".

(h) When petitioner tried at this point to see the record on file in the court, it was first "missing" and then later "found" - in a desk drawer. He was also refused access to other parts of the record until he adamantly insisted on seeing them.

(i) Before petitioner's answer to the preliminary objections had even been filed, petitioner heard unofficially from a private source that the court had already decided to dismiss the affidavit of defense, primarily because he was representing himself.

(j) When petitioner stressed to respondent's attorney the importance of a full trial of the issues in the affidavit of defense, he was told bluntly, "They'll never

let you near a courtroom!". About this time it began to sink into petitioner's head that respondent was not the only adversary he had to contend with in these proceedings.

(k) When the hearing was finally held, petitioner was instructed by the court to argue first, even though respondent was the one advocating the preliminary objections and seeking a judgment. When petitioner attempted in his argument to go beyond the scope of the preliminary objections and discuss other aspects of the case, he was cut off by the court.

(l) The court made no attempt to accomodate petitioner's hearing disability which had previously been brought to its attention, so petitioner was at a severe disadvantage to try to follow what the court and respondent said. He had to wait until later to get a transcript of his own tape recording to find out what had transpired.

(m) After dismissing the unargued

affidavit of defense and granting the preliminary objections, the court wrote an opinion which misstated and misinterpreted petitioner's case, obviously with the objective of turning it into some other case which could be disposed of in the manner previously decided.

Petitioner wonders what kind of confidence in responsible government, the rule of law, and the objectivity and impartiality of the judiciary this sequence of events is supposed to inspire. Any one of these irregularities might be explained as an oversight or resonably within the discretion of the state to determine the particular form and procedures it uses to provide due process, but when the various evidences and incidents are combined, the conclusion is inescapeable that it had been determined very early in the case what the outcome was going to be, and petitioner's efforts to present a defense and secure a fair trial of the issues were

for all practical purposes irrelevant to the proceedings. Respondent and the courts were obviously closely allied in their objective to throw the taxpayer out on his ear[12], as if the very presumptuousness of challenging the validity of a school tax was a sufficient sin to justify any means to accomplish this end.

Appeal to Commonwealth Court citing these problems was futile, and the Pennsylvania Supreme Court refused to even review the case. Petitioner is at a loss to know how to respond to such treatment, except to appeal again and plead anew his conviction that the courts at some level must recognize that the constitutional right of due process must eventually take priority over the unwillingness of a school district to have its tax levies subjected to any legal challenge.

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[12] Politely if possible. Petitioner is not accusing anyone at a responsible level of personal affront.

VI

THE STATE COURTS WERE UNJUSTIFIABLY BIASED AGAINST THE POSITION OF PETITIONER

It should be apparent from the preceeding discussion that there is a hostile bias in the Pennsylvania courts toward recalcitrant taxpayers which does not exist with other types of litigants. The presumption seems to be that a complaining taxpayer cannot possibly be right and should be pushed back into line as soon as possible by whatever means is necessary before he infects the general populace and hordes of citizens determine to revolt against legitimate taxation and cut off the state's income. This is a real bias, not just the sour-grapes viewpoint of the losing party in this case. It was evident from the very beginning of the proceedings and has never let up. Although for the most part the state courts obligingly went through the motions of processing the case as they were required to do, it is obvious that the end result was predetermined

by the nature of the case. Petitioner had refused to pay a tax, and such an action was viewed as an intolerable threat to the whole taxing system. In addition he had raised potent objections to the validity of the tax, the operation of the tax claim procedures, and the existence of an established educational policy of respondent. The state courts were not about to give such a taxpayer any opportunity to present or argue his defense against the tax claims. The stakes were much too high to risk a trial on the merits of the defense, and so the statutory procedures were bypassed by the simple expedient of turning the case into "another case" which should have been litigated "another way" and rejecting it on that basis. That this would trample on federal and state constitutional rights was of no apparent concern. The name of the game was politics and not law at all.

As far as appeal is concerned, the courts may have been counting on the

tradition of William Howard Taft who justified the limitation of access to higher courts by stating:

> "They have had all they have a right to claim, when they have had two courts in which to have adjudicated their controversy"[13]

Two courts processed this case, all right, but neither of those courts came close to "adjudicating"anything. They simply rejected out of hand petitioner's plea to have the controversy adjudicated. No trial, no jury, no reply to the defense, no consideration of its merits, no argument of the issues, no recognition of errors in the tax claims, no facing the challenge to the validity of the taxes - in short a flat denial of due process to petitioner[14].

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[13] Rehnquist (1987) page 269.

[14] In addition to the due process issue, it might be noted that a taxpayer is entitled to the same protection of the laws as any other litigant , as required by the equal protection clause of the 14th Amendment. To avoid complication, this issue will not be argued further at this time.

There is nothing inherently wrong with petitioner's case. He has state law, the state constitution, and the federal constitution on his side. This is not enough, however, if respondent has biased state courts on his side.

VII

THIS CASE INVOLVES CONTINUING AND IMPORTANT LEGAL, POLITICAL AND IDEOLOGICAL ISSUES

First, this case involves the continuing and important legal issue of the integrity of state tax collection procedures. In order to work properly, these procedures must furnish a reliable means of enforcing legitimate tax claims by the state, and at the same time protect the individual and property rights of the taxpayers. The tax statutes enacted by state legislatures are carefully tailored to satisfy these twin objectives, and the Pennsylvania Municipal and Tax Claim Act 1923 PL 207 is no exception. Its provisions would work reasonably well

to settle the issues involved in this case if they were allowed to be used as intended, but if these provisions are ignored or bypassed in judicial proceedings, it jeopardizes the whole tax collection system. As the Pennsylvania Supreme Court observed in Schmuck v. Hartman:

> "All taxation is statutory, and while it is the duty of every citizen to bear his just proportion of supporting national, state and local government, he cannot be compelled to do so, except in a way provided by statute."

When a court usurps the prerogative of the legislature to determine how tax claims are to be enforced, it effectively invalidates the authority of the statute itself. The ironical but logical consequence of the lower court decisions in the present case is that if petitioner is not permitted to use the statute to contest respondent's tax claims, respondent cannot use the statute to collect his claims either. Does the statute apply to the case or does it not?

Since the courts have effectively decided that it does not, the statutory tax collection machinery cannot operate as it was intended and the tax claims are effectively moot, notwithstanding the baseless "judgment" which the court granted on them without statutory authority. The whole collection process is thus stuck on dead center, and petitioner could forever ignore the claims if he did not mind them remaining on the record as unenforced (and unenforceable) liens.

In addition to this, when a state court abandons the statute, it negates the basis of its own authority over a defendant in a tax claim. When a court goes further and denies the constitutional right of a defendant to defend himself, the defendant is doubly justified in questioning the presumed power of the court in such a matter. After all, if the state courts refuse to accept the authority of state law, why should a litigant accept the authority of the state

courts?

Make no mistake, petitioner does not accept the validity of the "judgment" which has been handed down in this case. It is invalid because it has been arrived at by a flat denial of statutorily-provided and constitutionally-guaranteed due process. It presumably could still be imposed by force using the police power of the state, whether valid or not, but that would merely engender resentment against such abuse of state power, and disrespect or even contempt for the judiciary. No court need espect to have such a decision willingly accepted. On the other hand, if the court had acted within its proper authority and with an adequate statutory basis for its actions, the situation would be very different, and petitioner would have no valid complaint even if he lost his case at trial.

Second, this case involves the continu-

ing and important political issue of the policies of the judicial system which produced the untenable results reached here. These decisions were not accidental, but a direct result of established judicial policy and operating procedures in the Pennsylvania courts. If this can happen in petitioner's case, it may well happen in other taxpayer cases both now and in the future, and perhaps also happen in other states with similar judicial systems. Admittedly, many of these cases may be without merit, but all are entitled to fair consideration, and when such a case takes the form of a legitimate challenge to the validity of a tax or tax claim, as this one does, the answer is not arbitrary rejection of the taxpayer's position by denial of constitutional rights but the provision of a proper forum to evaluate the actual merits of the challenge, if any there be. Only in this way can we avoid destroying the voluntary cooperation of

American citizens upon which our taxing system very much depends, and sinking into ever more stringent efforts by the state to extract taxes from a frustrated, stubborn and rebellious citizenry. The risk of accomodating tax dissent is similar to the risk of accomodating any other type of civil dissent. It is a bother to the system, and the state risks losing a piece of its power or income. But the benefits are considerable and avoid the consequences of unrestrained state power which are tragically evident in many parts of the world today.

Except as restricted by the U.S. Constitution, the states are sovereign entities with their own systems of laws and courts. The Supreme Court will not interfere in the operation of those systems merely to correct errors, particularly where the errors are not apt to have any influence beyond their effect on the parties to the case, but where the constitutional rights of a citizen are

infringed by the actions of state courts, and where those actions are systemic and can be expected to continue and have a cummulative effect on the class of people affected, the Supreme Court can and should step in, because it is the last and only resort of aggrieved citizens in such a situation.

Third, this case involves the continuing and important ideological issue of the creation/evolution controversy, which has wide public recognition and interest today, and it does so in a way which has not yet been adjudicated.

This Court recently decided that creation as "religion" could not be taught along side of evolution in public school science classrooms[15], and had previously decided that evolution as "science" could not be excluded from such classrooms[16], but

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15 Edwards v. Aguillard.

16 Epperson v. Arkansas.

neither this Court nor any other federal or state court has ever decided whether evolution as "religion" should be permitted in science classrooms. This case presents the opportunity for the courts to address this very issue if they simply follow existing statutory tax collection procedures and try the merits of petitioner's challenge to the validity of the taxes which support evolution teaching.

In the Arkansas balanced-treatment case[17] which preceeded Aguillard and controlled its initial results, the federal district court's opinion stated:

> "Assuming for the purposes of argument that evolution is a religion or a religious tenet, the remedy is to stop the teaching of evolution, not establish another religion in opposition to it."

That is exactly what petitioner is trying to do. The creation/evolution controversy is not going to go away, because it involves a

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17 McLean v. Arkansas Bd Ed

fundamental clash of world views[18]. It must be dealt with in all its aspects. This case can make an important contribution toward that end. Petitioner has laid down a clear legal challenge in a tax format and seeks a fair trial on the issue of whether evolution is "science" or "religion". If evolution is as great as its proponents claim, respondent should have no trouble proving that it is "scientific" and therefore belongs in science class, which will establish the "evolution tax" as a lawful obligation of petitioner which he must pay whether he philosophically likes it or not. On the other hand, if evolution is not so great - if it is religion and not science as petitioner claims - it does not belong in science class, and no tax may be levied or collected

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[18] It would be interesting to know where the members of the Supreme Court themselves stand with respect to this ideological conflict. Because of the trend of decisions by the Court in recent years, petitioner is concerned about what effect this might have on the decision in this case.

to support its teaching. There is no need to short-circuit statutorily-provided and constitutionally-guaranteed due process procedures in order to avoid a fair trial of this significant and timely issue. The case should be remanded to provide a trial of petitioner's defense against respondent's "evolution tax" claims.

CONCLUSION

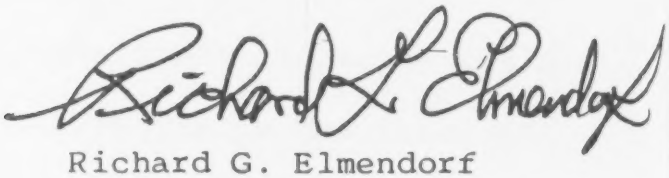
This case boils down to a very simple problem. The state courts have refused to allow petitioner to use the only statutory procedure available to contest certain tax claims upon his property, thereby depriving him of any means to defend himself against such claims.

This has been done not on the basis of independent and adequate state law grounds, but by misstating petitioner's case, ignoring clear errors in the claims, permitting irregular and unfair procedures, evidencing bias against petitioner's class, and otherwise denying statutorily-provided and constitutionally-guaranteed due process to petitioner. The federal constitutional issue that this involves has been properly raised and pursued by petitioner before these courts. The need for protection of individual rights is plain. The state courts

should be required to follow state law. Petitioner should be allowed to develop, present and argue his defense in a fair trial before an unbiased tribunal, including a jury of his peers.

Certiorari should be granted and the case remanded for further proceedings consistent with state law and constitutional rights.

Respectfully submitted



Richard G. Elmendorf
208 S. Magnolia Dr
Glenshaw Pa 15116

Petitioner

April 1988

APPENDIX A
ORDERS & OPINIONS

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RICHARD G. ELMENDORF :
Appellant :
: NO.2739CD1986
v. :
:
SHALER AREA SCHOOL DISTRICT:
Appellee :

BEFORE: Hon. John A. MacPhail, Judge
Hon. Joseph T. Doyle, Judge
Hon. Francis A. Barry, Judge

SUBMITTED ON BRIEFS: February 2, 1987

OPINION NOT REPORTED

MEMORANDUM PER CURIAM OPINION
FILED: JULY 28, 1987

Richard G. Elmendorf (Appellant) appeals from an order of the Court of Common Pleas of Allegheny County, which sustained the Shaler Area School District's (School District) preliminary objections to Appellants affidavit of defense to the Appellee's scire facias action. We affirm.

Appellant in this case withheld a portion of the school taxes due the school dis-

trict for the years 1981 and 1982 in protest of the School District's teaching of evolution. The present action commenced on January 10, 1986, when Appellant filed a Notice to Issue scire facias upon the School Distric. A writ of scire facias was filed by the School District, which explained that the School District had a lien upon Appellant's property because of his failure to pay part of his school taxes for 1981 and 1982. Appellant then filed his affidavit of defense, along with a request for a jury trial, to which the School District filed preliminary objections. Following a hearing the trial court sustained the School District's preliminary objections and upheld the validity of the School District's lien.

Appellant's first contention is that the School District's filing of preliminary objections to Appellant's affidavit of defense was improper. We reject this contention. Although Section 19 of the Act of

May 16, 1923, P.L. 207, as amended, 53 P.S. §7271, allows a plaintiff in a scire facias action to move for a rule for judgment for want of a sufficient affidavit of defense, our Supreme Court has also allowed the use of preliminary objections to challenge the sufficiency of an affidavit of defense. Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc., 422 Pa. 442, 221 A2d 128 (1966) Commonwealth, to Use of Unemployment Compensation Fund v. Lentz, 353 Pa. 98, 444 A2d 291 (1945).

Appellant next contends that the teaching of evolution by the School District may be challenged in a scire facias action. We disagree. The courts of this Commonwealth have consistently ruled that a taxpayer may not attempt to raise the merits of a tax claim in scire facias proceedings when he has not pursued his statutory remedies. Atlantic & Gulf Coast Stevedores; Lentz. Appellant does not challenge the School

District's right to collect the tax; rather, his contention is that the tax money is being spent for an illegal or unconstitutional purpose, i.e., the teaching of evolution in the School District. Appellant's remedies, however, include those found in Sections 608[1] (liability for improper school orders) and 610[2] (illegal use of school funds) of the Public School Code of 1949, but do not include a scire facias action.

Accordingly, the order of the Court of Common Pleas of Allegheny County is hereby affirmed.

FOOTNOTES

1. Section 608 of the Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §6-608.

2. Section 610 of the Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §6-610.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY PENNSYLVANIA

SHALER AREA SCHOOL DISTRICT Plaintiff	:	No. GD86-00504
vs.	:	
RICHARD G. ELMENDORF Defendant	:	

ORDER OF COURT

AND NOW, to-wit, this 12th day of August, 1986, after a hearing on the plaintiff's preliminary objections and consideration of the defendant's response thereto, it is hereby

ORDERED that Count I and Count II of the Plaintiff's Preliminary Objections are GRANTED, Counts III and IV are therefore moot.

BY THE COURT:

/s/ Cappy J.

Hon. Ralph J. Cappy

IN THE COURT OF COMMON PLEAS

OF ALLEGHENY COUNTY PENNSYLVANIA

SHALER AREA SHCOOL DISTRICT Plaintiff	:	No. GD86-00504
vs.	:	
RICHARD G. Elmendorf Defendant	:	

OPINION

BY: Hon. Ralph J. Cappy
September 12, 1986

This is an appeal from this Court's order of August 12, 1986 granting the plaintiff's Preliminary Objections in the nature of a demurrer. The action began on January 10, 1986 when the defendant, Richard G. Elmendorf filed a Notice to Issue Scire Facias upon the plaintiff. The writ of Scire Facias was filed by the plaintiff, Shaler School District on January 21, 1986. The Writ explained that the plaintiff had perfected a lien on the defendant's property because the defendant had failed to pay school taxes for

the years 1981 and 1982. On February 3, 1986 the defendant filed his affidavit of defense, requesting a jury trial. The plaintiff then filed preliminary objections on February 14, 1986. After various continuances argument on the plaintiff's preliminary objections was held on August 12, 1986 at which time they were granted.

The defendant, Elmendorf, had withheld a portion of his school taxes for the years 1981 and 1982 that he had designated as the "evolution tax", in protest to the teaching within the Shaler Area School District of the theory of evolution. The School District's preliminary objections were granted, as a taxpayer does not have the right to withhold properly assessed taxes as a protest to the educational philosophies of the School District. Regan v. Stoddard, 361 Pa. 469, 65 A2d 240 (1949).

BY THE COURT:

/s/ Cappy, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RICHARD G. ELMENDORF Appellant	:	
v.	:	No. 2739 CD 1986
SHALER AREA SCHOOL DISTRICT Appellee	:	

ORDER

PER CURIAM

NOW, July 28, 1987, the order of the Court of Common Pleas of Allegheny County, No. GD86-00504, dated August 12, 1986, is hereby affirmed.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RICHARD G. ELMENDORF Appellant	:	
v.	:	No. 2739 CD 1986
SHALER AREA SCHOOL DISTRICT Appellee	:	

ORDER

PER CURIAM

NOW, August 19, 1987, upon consideration of appellant's application for reargument, and it appearing that the Court's opinion and order were entered July 28, 1987, and the last day to file an application for reargument was August 11, 1987, and that the above application for reargument was filed August 12, 1987, said application is dismissed as untimely filed. See Pa. R.A.P. 2542, 2547.

IN THE SUPREME COURT OF PENNSYLVANIA

SHALER AREA SCHOOL DISTRICT Respondent	:	
	:	No. 388 W.D.
v.	:	Allocatur Docket
	:	1987
RICHARD G. ELMENDORF Petitioner	:	

ORDER

PER CURIAM

NOW, January 21, 1988, the petition for allowance of appeal in the above captioned matter is denied.

APPENDIX B
HOW THE FEDERAL QUESTION WAS RAISED

The federal question of constitutional due process was raised and pursued in various ways during the lower court proceedings as follows:

1. The question was initially raised indirectly in the Notice to Issue Scire Facias by reference to the 1923 PL 207 Tax Claim Act, which contains the statutory procedures for filing, contesting and collecting tax claims necessary to balance the property rights of a citizen against the government's right to collect taxes.

2. The question was next raised in the Affidavit of Defense in two ways. First, by an objection to the lack of notice by respondent of the intention to file claims and of the actual filing of the claims, with

specific reference to the 5th and 14th Amendments to the U.S. Constitution (par 20), and second, by asserting the right of a defendant in a tax claim to protect his private property from being taken and applied to public use illegally by raising such defenses as may preclude enforcement of the claim (par 8,59).

3. The right of due process was again indirectly asserted by petitioner in his demand for a jury trial. That is, he was demanding to have his defense heard and decided by an unbiased tribunal of his peers.

4. In the Answer to Preliminary Objections, petitioner raised the issue of due process in arguing against respondent's assertions that the court had no jurisdiction to consider the affidavit of defense. In paragraph 8 he referred to the state case of Commonwealth vs. Lentz wherein the court stated:

"A writ of scire facias is the time

> honored method in this Commonwealth for testing the validity of a lien. The writ of scire facias is 'due process of law' within the meaning of the Fifth Ammendment of the United States Constitution and 'due course of law' within the meaning of Article I Section 11 of the Constitution of the State of Pennsylvania."

In paragraph 9 he argued that the scire facias procedure must be applicable to any kind of objection to a tax claim, whether having merit or not, in order to provide "constitutionally-guaranteed due process protection." In paragraph 13 he maintained that he was entitled to develop his defense by means of discovery which serves to "provide a defendant with due process".

5. In the Brief in Opposition to Preliminary Objections, petitioner pointed out that the 1923 PL 207 statute allows <u>any</u> defendant to test the validity of <u>any</u> tax claim for <u>any</u> reason, and claimed the right of due process thus provided by the statute (page 3).

6. At the hearing on the preliminary objections, petitioner stressed the right of a defendant to use the scire facias procedure on the basis of "constitutional due process", and referred again to the judicial recognition of this principle in Commonwealth vs. Lentz.

Following the hearing, the Court of Common Pleas responded to the raising of these questions by ignoring them altogether and basing its decision on other grounds, dismissing the affidavit of defense without any consideration whatsoever of its merits.

7. On appeal to Commonwealth Court, in the Brief for Appellant petitioner next raised and extensively argued the question of due process and protested with specific reference to the 14th Amendment to the U.S. Constitution the denial of the use of the only statutory procedure available to a defendant to challenge tax claims[1] and the

resultant loss of the right of "statutorily-provided and constitutionally-guaranteed due process" (page 2,15-28,31,38, etc.).

8. The issue of due process was again raised before Commonwealth Court in the Reply to Brief of Appellee (paragraph 8b), and in the Application for Reargument,where petitioner challenged the court to recognize and decide the due process issue in these words:

> "Constitutional due process guarantees access to (the scire facias) procedure. The statute says any defendant named in a tax claim may use it. If the court disagrees, it must address the due process issue directly and specifically in order to justify its decision." (paragraph 4)

Petitioner also strongly protested the court's having placed its stamp of approval on the erroneous 1982 claim amount without giving petitioner any opportunity to contest it, as being "the very kind of wrong which the due process provision of the 14th Amendment to

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[1] Contrary statements of respondent and the lower courts are clearly in error on this point.

the U.S. Constitution was designed to prevent (paragraph 6).

Commonwealth Court did not recognize or decide upon the federal question clearly presented to it, but attempted to base its decision on state grounds.

9. Finally, in the Petition for Allowance of Appeal to the Pennsylvania Supreme Court, petitioner argued again that the 5th and 14th Amendments to the U.S. Constitution provide an "indefeasable right of due process" and that both lower courts had improperly denied this right while refusing to recognize the due process issue this raised (page 6-8).

The Pennsylvania Supreme Court denied this petition "per curiam" and therefore did not rule at all on the federal question.

From these references, it should be obvious that the federal question of due

process was raised and pursued in a clear, timely and adequate manner in each of the state courts. The refusal or failure of those courts to recognize and decide on the federal question properly presented to them is just as reviewable as an express decision on the question would have been. The necessary effect of the judgments of all three courts was to deny the claim. Since the judgments can not be justified on adequate and independent state law grounds, as has been proved elsewhere, this court has adequate jurisdiction to review those judgments.

It also seems evident that the state courts have in effect decided the federal due process question in a way which is in conflict with the constitutional principles of applicable decisions of the Supreme Court, thus meeting the requirements of RSC Rule 17(1)(c)(ii) to qualify for review. See page 15 of this petition.

APPENDIX C
STATUTORY & CONSTITUTIONAL EXCERPTS

UNITED STATES CONSTITUTION

AMENDMENT 14
Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

PENNSYLVANIA STATUTE 1923 PL 207

"Municipal & Tax Claim Act"
(53 Purdon's Statutes
7101 et seq)

Section 9 (53 PS 7143):

"Claims for taxes...must be filed in the court of common pleas of the county in which the property is situated..."

Section 10 (53 PS 7144):

"Said claim shall set forth...the name of the owner of the property against which it is filed..."

Section 15 (53 PS 7183):

"Such tax, municipal or other claim... shall remain a lien upon said properties until fully paid and satisfied..."

Section 16 (53 PS 7184):

"Any party named as defendant in the claim filed...may file, as of course, and serve a notice upon the claimant...to issue a scire facias thereon, within fifteen days

after notice to do so. If no scire facias be issued within fifteen days after the affidavit of service of notice is filed of record, the claim shall be stricken off by the court upon motion."

Section 17 (53 PS 7185):

"The claim shall be sued by writ of scire facias, and the form thereof shall be substantially as follows:...Now, you are hereby notified to file your affidavit of defense to said claim, if defense you have thereto, in the office of the prothonotary of our said court, within fifteen days after the service of this writ upon you. If no affidavit of defense be filed within said time, judgment may be entered against you for the whole claim, and the property described in the claim be sold to recover the amount thereof."

Section 20 (53 PS 7187):

"Tax claims and municipal claims shall

be prima facie evidence of the facts averred therein in all cases; and the averments in both tax and municipal claims shall be conclusive evidence of the facts averred therein, except in the particulars in which those averments shall be specifically denied by the affidavit of defense..."

Section 19 (53 PS 7271):

"...If an affidavit of defense be filed, a rule may be taken for want of sufficient affidavit of defense, or for so much of the claim as is insufficiently denied, with leave to proceed for the residue.

The defendant may, by rule, require the plaintiff to reply, under oath or affirmation, to the statements set forth in the affidavit of defense..."